

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

MEDSCI DIAGNOSTICS, INC.	*	Case No. 10-4961
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	*	
MEDSCI DIAGNOSTICS, INC.	*	
	*	
	*	
Plaintiffs	*	
	*	
Vs.	*	Adv. No. 10-94
	*	
STATE INSURANCE FUND CORP.	*	
	*	
	*	
Defendants	*	
	*	
	*	
	*	June 18, 2010
		Old San Juan,
		Puerto Rico

HEARING

BEFORE THE HONORABLE ENRIQUE S. LAMOUTTE
FEDERAL BUILDING, OLD SAN JUAN, PUERTO RICO

APPEARANCES:

For the Trustee:

For the Debtor: Rafael Gonzalez Velez, Esq.

Edgardo Munoz, Esq.
For the Debtor in Possession

For the Creditors:

Luis Marini, Esq.
Mauricio Muniz, Esq.
For SIF

Present:

Mayra Domenech

Gen. Counsel, SIF

CD:

Official Courtroom Deputy

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1 P R O C E E D I N G S

2 (10:39 a.m.)

3 (Case is called)

4 THE COURT: The Court has scheduled an
5 expedited emergency hearing on Debtor's claim to its
6 urgent motion for turnover of property, injunction,
7 and cease and desist order, and/or extraordinary
8 relief.

9 Are there any parties in interest present?

10 MR. GONZÁLEZ VÉLEZ: Your Honor, Attorney
11 Rafael González for Debtor/Plaintiff in the
12 adversary.

13 MR. MUÑOZ: Good morning, Your Honor.

14 Edgardo Muñoz representing Debtor in possession.

15 MR. MARINI: Good morning, Your Honor. This
16 is Luis Marini of O'Neill & Borges. I am here for
17 the State Insurance Fund. I have a number of people
18 from my office as well: my partner, Mauricio Muñiz,
19 Carlos Algardía, and Ana Margarita.

20 And, Your Honor, sitting with us is the
21 general counsel for the State Insurance Fund as well.
22 It's Mayra Domenech.

23 THE COURT: I'd like the parties to give me
24 a brief summary, introduction, of what you're going
25 to present.

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1 MR. GONZÁLEZ VÉLEZ: Yes, Your Honor.

2 THE COURT: Your argument and the evidence.

3 MR. GONZÁLEZ VÉLEZ: Yes, Your Honor.

4 Your Honor, essentially, what we intend to
5 show through the witnesses and the documents, most of
6 which are already part of the record and were
7 presented with of the complaint, and there was a
8 subsequent statement that, this morning, arrived at
9 our hands, and we -- we filed.

10 It's that the State Insurance Fund,
11 Defendant, during 19 -- I mean, 2007 -- I'm showing
12 my age -- needed substitute supply of services and
13 equipment for the regions of Ponce, Mayagüez, and
14 Carolina. That was the result of the end of the
15 contract of the prior supplier of those equipment and
16 services. And they have not had a happy experience
17 with that supplier, had sued them twice for
18 essentially the same sort of allegations that are
19 before this Court. And, without going into the
20 merit of those, it wasn't happy.

21 So, they wanted new equipment, you know, the
22 latest thing. They wanted to be able to provide to
23 their patients and insured better quality. And they
24 wanted it to have a system that allowed the State
25 Insurance Fund to have better records of the nature

1 and the findings of all these tests, radiological
2 tests, also for the [Industrial Commission] cases,
3 where many times the [Fund] found that it had lost
4 necessary evidence while in this. If -- if the
5 system was computerized and if a mention (sic) was
6 kept digitally, which is this system that they wanted
7 provides, they would always have the information
8 available, and they would be able to lose less cases
9 at the State Insurance Fund.

10 So, with that, those lofty goals in mind,
11 they obtained different proposals, and, eventually,
12 they accepted the proposal of Medsci, is essentially,
13 because it was the most complete, because it was the
14 one where the -- where the offerer of the services
15 was willing to be more precise about what dates and
16 what it would provide, and because it -- Medsci was
17 willing to provide or to acquire the old equipment
18 from the old supplier, the one that was leaving, in
19 this case specifically, Medsci -- I'm sorry --
20 Western Imaging and its arm, Radio Sonics, so that
21 that equipment could be fixed that apparently was in
22 a state of disrepair and services could be
23 adequately, at least, provided in a continual manner
24 until the new equipment was put in place for the new
25 way of doing things.

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1 That would -- the expectation was that would
2 be more or less transparent, the change from one to
3 the other, which was not part of the other side.

4 So, with those criteria in mind, or so it
5 has been represented, they chose Medsci. In order to
6 induce Medsci -- and because it was true -- it was
7 represented to Medsci that the volume of cases from
8 the three regions in question would amount something
9 between \$12 million, \$13 million, \$14 million per
10 year.

11 The contract, it was drawn for 14.7, but
12 there was no representation that it would be so high.

13 I mean, it was drawn for a bit more in case the
14 quality of the services -- to have space, not to need
15 an additional contract. But, certainly, it was more
16 than \$10 million seeing for the three.

17 That number was not drawn out of the sky. I
18 mean, it was the result of the statistics of the
19 State Insurance Fund for the three prior years, which
20 reflected that volume as the volume for the three
21 regions.

22 No, no specific representation was made to
23 our client "We're going to build you a meeting hall
24 of 12" (sic), but it was represented that "That is
25 the volume of the region, and you're going to get

1 everything in that region".

2 And it should be: \$12 million, more or less.

3

4 So, there was a factor of error which was
5 accepted by Medsci of maybe 10%, 15%, up or down.

6 And then, when Medsci proceeded accordingly
7 to buy extremely expensive equipment that would be
8 able to provide the services and satisfy the
9 expectations of State Insurance Fund as represented
10 to them on the premise that they were going to be
11 billing these amounts, because the sort of equipment
12 that the State Insurance Fund wanted and represented
13 needed the sort of volumes that we're talking about.
14 This expensive equipment it cannot be paid for with
15 the sort of volume that are being sent through
16 Plaintiff for the last two years.

17 Now, we understood that the first year there
18 was -- there's a startup and maybe the volumes would
19 not be so high. If for nothing else, because for the
20 first six months the services could be provided with
21 the old equipment, the equipment that Medsci acquired
22 from Western Imaging which is obsolete equipment and
23 did not have the capacity of this new equipment to be
24 installed.

25 So, necessarily, the first year of the

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1 volumes would not be as high. But it doesn't mean
2 they were low. Do remember that they had been, for
3 the last three years, generating the volumes that
4 we're talking about: \$10 million, \$12 million, \$13
5 million between Western Imaging, using obsolete
6 equipment, and they were being processed, billed, and
7 paid.

8 So, it's still -- but, from the point of
9 view of Medsci, Medsci accepted that, in the first
10 year, you know, it would not be that high, it
11 wouldn't be maximum efficiency.

12 What has happened is that, even at this
13 year, the volume of the instances is about one-third
14 or less of the expected volume. And, necessarily,
15 with that sort of volume, the company cannot survive,
16 particularly because the contract provides that no
17 service can be supplied or provided to outsiders,
18 except only [Fund] patients can be referred to this
19 facility and attended to by Medsci -- in fact,
20 they're not attended to by Medsci, it's technicians.
21 The [State Insurance Fund]'s technicians used
22 Medsci's equipment, produced the tests, and then they
23 are interpreted by a doctor which is provided by
24 Medsci.

25 A tele-radiology center was installed by --

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1 as part of this proposal, which is probably the
2 largest one in the whole Caribbean Sea, the most
3 complete. In short, it's -- it's very expensive
4 equipment designed to receive intense use. It
5 requires expensive maintenance, very expensive. And
6 the operating costs were originally projected to be
7 close to \$5 million.

8 Those projections, we admit, were very
9 conservative. They were designed both by the gun
10 (sic) and also because the investors in this
11 corporation, which was set up specifically to enter
12 into this agreement with the State Insurance Fund,
13 wanted to ensure that they had a conservative
14 projection to know whether it was worth investing.

15 The fact is that the costs are less. They
16 are close to four -- not quite -- \$4 million a year.
17 But, still, \$4 million a year. And the business
18 that's being referred to Medsci is substantially
19 less.

20 Unless Medsci has reduced its number of
21 insured to less than one-third -- we -- we do realize
22 that the economy is in a very bad situation, but it
23 was very bad in those years that were used for these
24 statistical purposes and the projections -- but,
25 unless it's been reduced to 1/3, then we must

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1 understand that the [Fund] is referring those
2 patients to outside contractors instead of referring
3 them to Medsci as it agreed to.

4 I mean, it's too large the difference. 10%
5 maybe explained. 65%, 70% -- it's our contention --
6 can only be sold from referring the things -- I mean,
7 the patients, to outside contractors, with the
8 specific intent of either damaging Medsci and driving
9 it out of business or with the specific -- well, I --
10 beyond that, I cannot speculate; so, I'll leave it
11 there.

12 But it's clear -- not sustainable -- that
13 the volume of cases diminished this much.

14 And it must be remembered, Your Honor, that
15 the contract provides that Medsci will be the
16 exclusive supplier of services for these three
17 regions, meaning that those \$12 million in billing
18 should be billed by Medsci, with the exception that
19 Medsci were not able to supply the services, for
20 example, for some instance unforeseen there's a
21 sudden increase in the number of patients, then that
22 would -- or for whatever reason the machinery, or
23 there's no energy in Ponce, for example, for some
24 unforeseen reason and they cannot provide the
25 service, then [Fund] can refer those patients to

1 outside suppliers.

2 But, otherwise, they all have to go to
3 Medsci.

4 We must remember that Medsci does, though,
5 has equipment that can take care of minimal patients
6 than those two entities. This is the latest, as
7 required by State Insurance Fund, the latest
8 equipment, designed to work 24 hours a day, with
9 expensive maintenance, but provided in short periods
10 of time at off-duty hours, it's that type of thing.
11 So, it's not -- and it also -- they also have backup
12 systems which is part of the consideration that to
13 our understanding [Fund] took in before it handled or
14 gave the contract to Medsci. It was the redundancy,
15 meaning that if there's some sort of problem --

16 THE COURT: Mr. González?

17 MR. GONZÁLEZ VÉLEZ: Yes?

18 THE COURT: What I've heard is a background

19 --

20 MR. GONZÁLEZ VÉLEZ: Um hum?

21 THE COURT: -- to the merits of the
22 complaint --

23 MR. GONZÁLEZ VÉLEZ: Okay.

24 THE COURT: -- which -- which I have read.

25 Now, what I want to know is: -- and the

1 complaint that, I think, as of now has not been
2 answered yet. So, the complaint is the beginning.
3 And I have scheduled this emergency expedited hearing
4 based upon the urgent motion.

5 I want to know what is the urgency and what
6 are you requesting on an urgent expedited basis.

7 MR. GONZÁLEZ VÉLEZ: Okay.

8 THE COURT: Because, if it is not granted,
9 it will cause, as I stated in one of my orders,
10 immediate and irreparable harm.

11 MR. GONZÁLEZ VÉLEZ: Number one, we need
12 payment of outstanding debt.

13 There's amounts of 12 -- I think today it
14 was \$800,000-something over 60 days.

15 Furthermore, we need that [Fund] stop
16 referring clients -- and that's why I made that big
17 fuss about it just -- just prior -- stop referring --
18 stopped referring patients to outside suppliers.

19 Because, if it does not, this company is
20 bound to go under, because the costs are -- of
21 operating even at reduced -- are more than what and
22 they are billing to the State Insurance Fund today.

23 THE COURT: So, you're requesting that the
24 State Insurance Fund complies with the terms of the
25 contract?

1 MR. GONZÁLEZ VÉLEZ: That's it.

2 THE COURT: Okay. I trust that the --

3 MR. GONZÁLEZ VÉLEZ: That's it. We're also
4 requesting some sort of compensation for the years we
5 have been in operation and the cases have not been
6 supplied. But -- but --

7 THE COURT: Before we go further -- and,
8 since most of those motions were filed on an
9 expedited basis, I -- I admit that I concentrated on
10 the substance of the motion. But I did not look that
11 closely to the caption nor the cover sheet.

12 But, this morning, upon reviewing again of
13 the documents, I noticed that the Debtor-Plaintiff is
14 requesting trial by jury.

15 MR. GONZÁLEZ VÉLEZ: Requesting? Pardon me?

16

17 THE COURT: Trial by jury.

18 MR. GONZÁLEZ VÉLEZ: Yes, Your Honor, we
19 did.

20 THE COURT: So, that's a fresh issue which I
21 have to determine. Because, if the Plaintiff is
22 requesting trial by jury, according to 28 USC 157
23 (e), this Court cannot entertain the matter unless
24 there is expressed consent of the parties.

25 MR. GONZÁLEZ VÉLEZ: To the trial by jury?

1 THE COURT: Yes.

2 MR. GONZÁLEZ VÉLEZ: We would -- we -- we --

3 THE COURT: I would not have authority, I
4 mean,

5 I'm --

6 MR. GONZÁLEZ VÉLEZ: -- we would consent.

7 MR. MARINI: Your Honor, we would not
8 consent. And I have -- I don't want to interrupt
9 argument, but I have another threshold issue that,
10 when Brother Counsel finishes, I want to raise as
11 well.

12 MR. GONZÁLEZ VÉLEZ: Well, we would consent.
13 That's number one. This --

14 THE COURT: I'm not saying that there is the
15 right to trial by jury.

16 MR. GONZÁLEZ VÉLEZ: Okay. That's the
17 question.

18 THE COURT: I'm saying that there is a
19 request for trial by jury.

20 MR. GONZÁLEZ VÉLEZ: And that's also what we
21 -- the other thing we would -- essentially, to put in
22 negative terms the request for compliance, we would
23 say "Cease and desist" to refer to outside
24 contractors those patients from the three regions to
25 which Medsci has contractually exclusive right.

1 That's -- that's putting it on a don't-do-
2 that-any-more point of -- that would be it, Your
3 Honor.

4 Also, Your Honor, at this stage of the -- of
5 how -- of the case, it's -- this is not a jury
6 matter. This is a preliminary injunction. It's not
7 a jury -- a jury matter. But, of course, we could go
8 to the courts to determine whether this emergency
9 request is justifiable and should be granted. This
10 is not the -- the thing we're here today for is not a
11 jury matter. It's only at the end --

12 I have been informed just at this moment by
13 Brother Counsel that Debtor-Plaintiff's principal has
14 a -- that if Brother Counsel or Defendants do not
15 accept trial by jury before this Court, we'll
16 renounce to our request for trial by jury.

17 MR. MUÑOZ: If needed for obtaining today's
18 remedy, urgent remedy.

19 MR. GONZÁLEZ VÉLEZ: As clarified by Brother
20 Counsel Edgardo Muñoz.

21 Regarding who and the evidence, besides the
22 documents already on record, which we, of course,
23 offer as evidence, we will supply or provide the
24 testimony of Mr. Carlos Ruiz who was the
25 administrator of the State Insurance Fund when this

1 contractual contract was entered into; Don Roberto
2 Reyes Pérez who was the boss of contracting, of the
3 contracting division or office -- chief of
4 contracting at the [Fund] at the time; Doña Monica
5 Vizcarrondo who's the administrator of Medsci; Don
6 Eduardo González Vin who is the CPA who prepared the
7 pro forma, that's the projections, the financial
8 protections before entering into the agreement and
9 asking for the loans, and who also audits the books
10 of the corporation; Mr. Raúl Valón and Mr. Osvaldo
11 Carlo who are the two principals of Medsci who of
12 course have assured the loans and guaranteed the
13 loans that were taken for this matter and who have
14 all the direct knowledge of the events and facts that
15 are alleged in the complaint.

16 That would be our essential evidence.

17 We may add something like the latest or the
18 last audited statements which were not included with
19 the complaint. But, essentially, that is going to be
20 our evidence.

21 THE COURT: Mr. Marini?

22 MR. MARINI: Thank you, Your Honor. For the
23 record, Luis Marini for the State Insurance Fund.

24 I think Your Honor summarized the issue
25 before the Court today. First, this is a contractual

1 dispute. And, in addition to the withdrawal of
2 reference, which I understand is a threshold issue,
3 and even if Plaintiff renounces to their right to
4 trial by jury, my client is not waiving that right.

5

6 So, I think the issue certainly is still
7 before the Court, that it is an important and a
8 threshold one.

9 But there's another one, Your Honor. There
10 is -- it is an important issue that, I think,
11 prevents the Court from entertaining the merits of
12 the allegations in the motion and the merits of the
13 allegation in the complaint.

14 And that is, Your Honor, that the
15 Constitution provides protections to States, to arms
16 of the States, and to instrumentalities from coming
17 into a federal court and being sued by a citizen of
18 that State. That protection, Your Honor, is notified
19 in the 11th Amendment and in the Sovereign Immunity
20 Doctrine.

21 Now, in Bankruptcy, Your Honor, the
22 sovereign immunity applies, as this Court well knows,
23 with some exceptions. Prior to 1994, before the
24 amendment of the bankruptcy -- of the Bankruptcy
25 Code, the law in Bankruptcy was that you could not

1 bring a State and request a money judgment against a
2 State or an instrumentality of a State in a
3 Bankruptcy Court.

4 Now, Congress amended that, Your Honor. It
5 enacted section 106 of the Bankruptcy Code and
6 specifically included therein a number of provisions
7 for which Congress understands that the States have
8 abrogated their right to request sovereign immunity.
9 And the provisions are listed there.

10 But the intent was to allow a Bankruptcy
11 Court and allow a Plaintiff to assert bankruptcy
12 causes of action against a State, not prepetition
13 causes of action.

14 Originally -- if I may -- I wrote one
15 sentence from the legislative history to the
16 amendment to Section 106 which states -- and I quote
17 -- "Section 106 (a) (1) specifically lists those
18 sections of Title 11 with respect to which sovereign
19 immunity is abrogated".

20 It's about the assertion of bankruptcy
21 causes of action but specifically excludes causes of
22 action belonging to the Debtor that became property
23 of the estate under section 541.

24 The citation, Your Honor, is 140
25 Congressional, H 10, 766.

1 If I may, Your Honor, cases interpreting
2 that legislative history -- and what I'm talking
3 about is in 1-7-10 (sic) from Collier's -- Collier's
4 states -- and I quote -- "What -- summarizing what --
5 explaining what Congress was doing, it states -- and
6 I quote -- "Congress excluded section 541 from the
7 abrogation list, as a result of which Rubberman
8 (sic), Defendants, are still permitted to assert
9 sovereign immunities in proceedings brought by the
10 estate to enforce a prepetition cause of action".

11 Congress apparently did not want to allow
12 the happenstance of a Debtor's Bankruptcy to permit
13 the estate to obtain a recovery against a
14 governmental unit that would not have been otherwise
15 available outside of bankruptcy because of sovereign
16 immunity.

17 That's from Collier's, paragraph 106-21.

18 And that's exactly what is before the Court
19 today. The State Insurance Fund is certainly
20 entitled to the protections of the 11th Amendment of
21 the Constitution of the United States, the
22 protections of the principle of sovereign immunity
23 that has been so adjudicated by the District Court in
24 the -- most recently, in the case of last year,
25 Berrios vs Nazario, citation 2009 U.S. District

1 Court, Lexis 25841, DPR 2009.

2 And that is what is before the Court. The
3 Court articulated it. That's how the Plaintiffs have
4 drafted the complaint. This is a contractual
5 dispute.

6 And the dispute could have been raised,
7 could have been filed one week before the bankruptcy
8 case, it could have been filed today in the State
9 Court, and it would have been the exact same
10 allegations that are before the Court today, with one
11 exception that I'll get into now: and that is the
12 request for turnovers.

13 That, I agree, the request for turnover is a
14 pure Bankruptcy cause of action. But it is
15 inapplicable to the facts of this case.

16 Because, turnover, under 542, is expressly
17 limited to debts that are mature, payable on demand,
18 or payable on the order. That is not the case here.

19 542, and the cases interpreting the same,
20 explicitly state -- and I'm going to quote just from
21 one of them that section -- and I'm quoting --
22 "Section 542 is not a provision in the Code to
23 determine the rights of parties in legitimate
24 contract disputes". This is from In re: FLR Co., 58
25 BR 632, Bankruptcy, Western District of Pennsylvania

1 1985.

2 And that line of cases and that limitation
3 of 542 is consistent in the case law. You can notice
4 that section to bring in legitimate contractual
5 disputes.

6 And what they have done today, Your Honor,
7 what they are doing through the complaint is that
8 they're using the Bankruptcy Court to bring in a
9 government that couldn't have been brought in the
10 absence of the bankruptcy to assert causes of actions
11 that are precluded by the sovereign immunity
12 principles.

13 And that is a threshold issue, Your Honor,
14 that I think requires a dismissal of the complaint
15 complaint, and that it be asserted, if they want to
16 assert it, in the state courts.

17 I have other arguments, Your Honor, but I'm
18 waiting if you have questions on this one.

19 THE COURT: Do you have a decision that
20 determines that the State Insurance Fund is an
21 instrumentality of the government which enjoys the
22 sovereign immunity --

23 MR. MARINI: Yes, Your Honor, I do.

24 THE COURT: -- protection?

25 MR. MARINI: And I will cite to them, and I

1 will read you -- the decision is Jorge Luis Berrios
2 Trinidad vs. Carlos Ruiz Nazario. It's a decision
3 from March 26, 2009, from the District Court of the
4 District of Puerto Rico.

5 And I'm going to quote just one sentence.
6 The decision is very short, but it's exactly on this
7 issue. The sentence states -- and I quote --
8 "Accordingly, this Court finds that the State
9 Insurance Fund to be immune from suit under the 11th
10 Amendment in the instant action".

11 Prior to that, it is determining that the
12 SIF is a government agency, a government
13 instrumentality, and that it is entitled to the
14 protections of the 11th Amendment.

15 Throughout the opinion, Your Honor, there
16 are other decisions cited previous to that supporting
17 that same conclusion, but that is the most recent one
18 I could find. It is one from last year, and it is
19 from the District Court in Puerto Rico.

20 THE COURT: Reply?

21 MR. MARINI: But, to be clear, I have other
22 --

23 THE COURT: Well, Counsel, --

24 MR. MARINI: -- I want to make them now,
25 because I think this issue is -- it's a threshold

1 issue. If the Court wants me to get into other
2 arguments as well, I will.

3 MR. MUÑOZ: Edgardo Muñoz on behalf of
4 Debtor.

5 Your Honor, regarding the threshold, the so-
6 called threshold issue of the sovereign immunity,
7 Your Honor, Section 106 cited by Brother Counsel
8 specifically provides for the abrogation of the
9 sovereign immunity even if it exists and it covers
10 the State Insurance Fund, not only for a 542 action
11 but also for a Section 105 action and section 362
12 action.

13 And we are -- we are -- we are basing our
14 adversary proceeding in those three sections of the
15 Bankruptcy Code.

16 Even assuming that section 106 is limited,
17 as stated by Counsel, which we do not consent -- we
18 do not concede, because, if we read section 106, it
19 makes no limitation as to if it's a prepetition cause
20 of action or a post petition cause of action.

21 But, even -- even conceding that for purpose
22 of argument, we have prepetition causes of action and
23 post petition causes of action presented in this
24 adversary proceeding. This Chapter 11 case is the
25 contract.

1 The contract is this Chapter 11 case. The
2 contract is the estate's most valuable asset by far.
3 Without the contract, this Chapter 11 case will go
4 nowhere.

5 So, this Court has absolute exclusive
6 jurisdiction over the estate, and, if the contract is
7 the very essential part of the estate, it's obviously
8 within this Court's jurisdiction.

9 The protection of that contract involves
10 various post petition actions. For instance, we have
11 to assume the executory contract. To assume the
12 executory contract, we must defend, we must preserve
13 the executory contract. That's a post-petition cause
14 of action.

15 Regarding Section 106, going back to Section
16 106, Your Honor, in this time and instance, there's
17 no constitutional infringement of Section 106 as
18 applied to the States. And the Supreme Court so
19 decided in at least two cases which ended that
20 problematic view of Section 106 which had -- which we
21 have had to deal with for several years. But there's
22 a case of Tennessee Student Assistance Corp. vs. Who
23 (sic) reported under 541 U.S. 440; and Central
24 Virginia Community College vs. Katz, 126 Supreme
25 Court Reporter 990.

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1 Now, going back to Section 106, it does
2 include as those sections under which we can claim --
3 and the state cannot defend itself by raising the
4 immunity -- Section 105, we're claiming an injunction
5 under 105 -- section 362, where claiming that the
6 State Insurance Fund's in dealings with this
7 contract, trying to do away with the contractual
8 rights of Debtor and withdraw -- withholding payments
9 to the Debtor are all in violation of the automatic
10 stay contained in section 362.

11 And we are also claiming that section 542
12 puts the burden on the State Insurance Fund -- and
13 that's a post-petition cause of action -- puts the
14 burden on them to deliver, to turn over all the
15 property of the estate that should be in the hands of
16 Debtor in Possession. And, right now, it is not,
17 because they are withholding the turnover.

18 Specifically, Your Honor, I would like to
19 cite a case in point. This case stands for the
20 proposition that failure -- failure of an entity in
21 possession of estate property to turn over that
22 estate property to the Trustee would be a violation
23 of Section 362 (a) (3).

24 Specifically, from the Ninth Circuit,
25 Employment Development Department vs. Paxé (sic) --

1 that's within the bankruptcy case of In re: Del
2 Mission Eltiny (sic), reported under 98 F. 4 1147.
3 Specifically, that case states that normally a
4 failure to pay a debt owed to a Debtor is a violation
5 of the automatic stay. So, it's a specific case,
6 right on point.

7 Finally, Your Honor, we must acknowledge
8 that those that speak in authorities speak with --
9 among the cases regarding the violation of the
10 automatic stay by withholding payment. We do
11 acknowledge that. Because, what we are claiming,
12 that -- the part -- the portion of the automatic stay
13 that we're claiming is being violated by the State
14 Insurance Fund is that part of the automatic stay
15 that prohibits an entity from exercising control over
16 property of the estate.

17 Some cases require something more than the
18 passive non-payment to be interpreted as an exercise
19 in control over property of the estate. But, still,
20 other cases do acknowledge that even that passive
21 failure to pay is a violation.

22 Among those cases, we have the First Circuit
23 BAP case, Reliable Equipment Corp. (sic) vs. Turabo
24 Motors Corp., which this Honorable Court is familiar
25 with, because that -- that specific case upholds a

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1 decision by the Hon. Enrique S. Lamoutte in which he
2 decided that, by not turning over a specific item of
3 property of the estate, that person or that entity in
4 control of that -- in possession of that property was
5 violating the automatic stay.

6 The site of the Reliable Equipment decision
7 in the BAP, Your Honor, is 2002 Bankruptcy Lexis
8 1278. It's a BAP opinion of October 21, 2002.

9 THE COURT: Let's assume that I decide that
10 the causes of action pled in the complaint as well as
11 in the urgent motion are not excluded by sovereign
12 immunity because they go to the Court of the
13 administration of the estate. Assume that.

14 Why would I still have jurisdiction to
15 entertain this action when the Plaintiff requests
16 trial by jury, and 157 (e) requires the consent of
17 all parties?

18 MR. MUÑOZ: Well, Your Honor, I would
19 respectfully disagree with the wording, because of
20 the right to trial by jury doesn't have anything to
21 do with the Court's jurisdiction over the matter.

22 It has to do --

23 THE COURT: Well, who can -- well, who can
24 hear it?

25 MR. MUÑOZ: Excuse me?

1 THE COURT: Who can hear it?

2 MR. MUÑOZ: Who can hear it at trial level?

3 THE COURT: At trial.

4 MR. MUÑOZ: But, right now, we are
5 requesting an extraordinary relief, the injunction,
6 which is by definition outside of the scope of a jury
7 matter.

8 This is specifically the kind of thing that
9 we cannot ask --

10 MR. GONZÁLEZ VÉLEZ: The jury, [period].

11 MR. MUÑOZ: -- that -- that we cannot ask a
12 jury to enter into an extraordinary relief like the
13 one we are requesting.

14 I am being reminded once again that, if it
15 comes to that, Your Honor, if it comes to having to
16 waive the trial by jury in order to obtain today's
17 urgent remedy, our client has stated for the second
18 time that it's willing to waive trial by jury.

19 But, answering Your Honor's question, this
20 Court's jurisdiction emanates from 28 U.S. Code 1334
21 (e), which gives this Court exclusive jurisdiction
22 over property of the estate. It also
23 emanates from 28 U.S. Code 1334 (b), which gives this
24 Court jurisdiction and it will remain in this Court
25 until and unless someone files for a withdrawal

1 reference, in which case the Court with the
2 jurisdiction over the matter at this stage in which
3 it is withdrawn will be the U.S. District Court.

4 So, the only problem posed by the opposing
5 party not consenting to the trial by jury, the only
6 difference it will make in their case is that, if at
7 that point in time we are still claiming -- we are
8 still requesting trial by jury, then we will have to
9 decide to move the Court for a withdrawal reference
10 so that at the trial level this case will be dealt
11 with before the U.S. District Court.

12 But today's hearing is not before a jury.
13 So, today's hearing we don't have any problem -- we
14 should not have any problem with the lack of consent
15 to the trial by jury by the opposing party.

16 (Counsel for Debtors confer)

17 MR. MUÑOZ: Okay, Your Honor, I must add to
18 the record that we are amending the complaint to
19 withdraw the claim for -- the request for trial by
20 jury.

21 So, it's no longer an issue before the
22 Court.

23 MR. MARINI: May I respond?

24 THE COURT: Yes, you may proceed.

25 MR. MARINI: Again, Luis Marini for State

1 Insurance Fund.

2 Your Honor, Brother Counsel in his argument
3 favored the case law and the analysis that I'm
4 supporting. Because, he stated at the beginning of
5 the arguments that the biggest asset of this case is
6 the cause of action that they have or the contract
7 that they have with my client.

8 And the only reason that cause of action is
9 an asset of the estate is pursuant to section 541
10 which invests any prepetition causes of action upon
11 the estate upon the filing of a bankruptcy. And
12 section 541 is specifically excluded from Section 106
13 of the Bankruptcy Code as to the sections for which
14 immunity has been abrogated.

15 The sections that I cited from the
16 congressional intent and the analysis from Collier's
17 go to exactly this issue, which is to prevent a
18 Plaintiff from using Bankruptcy to present causes of
19 action that could have been filed prepetition against
20 the estate.

21 And that principle, Your Honor, of sovereign
22 immunity, I understand, applies in this -- in this
23 case and requires the dismissal of the complaint.

24 I cited a case from the Supreme Court, the
25 Katz case, and I agree that that case resolved a

1 substantial controversy as to 106. But it is not the
2 issue that is before the Court today.

3 What it resolved was that, prior to that
4 case, there was a split of authority among the
5 circuits as to whether the limitations that we're
6 discussing now, that abrogation of the sovereign
7 immunity powers as to certain specific sections of
8 the Bankruptcy Code, whether that was constitutional
9 or not, and whether the States had in fact acquiesced
10 to having those sections abrogated from that defense.
11 That was it solely.

12 So, the Supreme Court found 106 to be
13 constitutional. That is why I'm arguing that it
14 applies. But it specifically excludes section 541
15 from the sections as to which a defense has been
16 abrogated, or waived for lack of a better word. And
17 that is not what is before Your Honor today.

18 Now, --

19 THE COURT: Mr. Marini?

20 MR. MARINI: Yes?

21 THE COURT: Is there a valid contract
22 between the Debtor and the State Insurance Fund at
23 this time?

24 MR. MARINI: Your Honor, that is another
25 threshold issue, and I will explain -- I will explain

1 why.

2 If I may -- may I respond to the remainder
3 of the arguments, or should I get into that -- that I
4 had two more -- two more points that I was going to
5 say to what Brother Counsel mentioned.

6 When is he mentioned the Ninth Circuit case
7 which goes into whether this is a violation of 362.
8 I think that case and that reasoning and that lineup
9 is that that it's just not applicable. Because, for
10 funds to be property of the estate and be subject to
11 542, that they have to be undisputed, they have to be
12 a mature. And that is not the case here -- in the
13 case, Your Honor.

14 In fact, the case -- the cases where there
15 is a contractual dispute, the situation that has to
16 arise for the funds to be part of the estate as
17 requiring either a final judgment or a stipulation
18 from the party.

19 THE COURT: But is there a valid contract --

20 MR. MARINI: Your Honor, I think there is
21 not a valid contract.

22 THE COURT: -- between the Debtor and the
23 State Insurance Fund?

24 MR. MARINI: I think there is --

25 THE COURT: So, there is a valid contract?

1 MR. MARINI: -- I think there is not a valid
2 contract for --

3 THE COURT: Not a valid contract?

4 MR. MARINI: -- not -- not a -- the
5 contract, I understand, is null and void.
6 Potentially null and void -- I'm going to -- I'm
7 going to be careful and rephrase the argument -- for
8 the following reason, Your Honor.

9 I say "Potentially" because I'm using
10 literally only the facts alleged in the complaint. I
11 haven't taken any discovery on the merits. But, in
12 the complaint, the plaintiff alleges that Medsci is
13 incorporated as a corporation and dedicated to -- and
14 I quote -- "Providing radiology services". This is
15 from paragraph 8 of the complaint.

16 Now, Your Honor, the applicable law requires
17 anyone that's going to provide radiology service to
18 be a licensed physician. That is black letter law,
19 20 LPRA Section 135 (b).

 Now, we go to the
20 law of corporations, and the law of corporations of
21 Puerto Rico specifically states what type of entity
22 can provide professional services that require a
23 license, such as physicians. In the law of
24 corporations of Puerto Rico, article 18 and so on,
25 state that the only type of entity that can provide

1 professional services is a professional service
2 corporation. And it states the requirements to be a
3 professional service corporation.

4 Among them, all of the owners, all of the
5 principals, all of the shareholders must be licensed
6 in the profession that the corporation is providing
7 services, in this case, licensed physicians.

8 And I'm only taking the affidavits that they
9 filed. I haven't taken any depositions. It may very
10 well be that Mr. Edgardo Carlo and -- and his partner
11 are licensed physicians. I do not know. It does not
12 appear from the declaration. It only says that they
13 are counselors at law.

14 Now, the issue with that, Your Honor, is
15 that they take the Puerto Rico Supreme Court cases --
16 there is a line of cases that, starting with a case
17 called Raza Engineering vs. Dubón, case 86 DPR 193, a
18 subsequent decision made in Regio de Ingenieros (sic)
19 vs Autoridad de Acueductos y Alcantarrillados, 131
20 DPR 735, and, in that line of questioning, are --
21 that -- those -- those cases articulate that you
22 cannot have a valid contract when the corporation
23 that is providing the professional services is not
24 authorized to do so.

25 In those cases, in one of them, it was a

1 corporation that was providing engineering services,
2 and some of the owners were not licensed engineers.
3 That was in question. And the Supreme Court said if
4 that were the case, the contract is null and void.
5 And it remanded to find out whether in fact that was
6 the case at the trial court level.

7 If, Your Honor, the owners of these
8 corporations are not licensed physicians as required
9 by law, the contract is null and void, and it isn't
10 in existence.

11 Now, I mentioned that I had a number of
12 special issues at the beginning. I haven't gotten
13 into the merits, but those are the three, I think,
14 threshold jurisdictional issues: one is my client is
15 not waiving the right to a jury trial; the time to
16 answer the complaint has not expired; --

17 THE COURT: Do you think there is a right to
18 jury trial?

19 MR. MARINI: I think there is a right to
20 jury trial, yes.

21 THE COURT: Why?

22 MR. MARINI: Your Honor, because we haven't
23 -- well, I need to preserve the right to a jury
24 trial, Your Honor.

25 THE COURT: Is this a cause of action that

1 would have been heard before a jury in state court?

2 MR. MARINI: Your Honor, I -- it -- well, I
3 think it could be heard in the District Court. No, I
4 need to preserve the right. Because, to be candid, I
5 need to look at that issue. But I think there is a
6 right, a potential right to a jury trial.

7 Particularly, there are counterclaims filed by my
8 client.

9 And I cannot, at this stage, Your Honor,
10 responsibly waive that right at a preliminary
11 hearing. And the right exists, and it is
12 articulated.

13 What I -- what I can state to the Court,
14 because I have consulted with my client, is that
15 they're not going to consent to a trial by jury in
16 the Bankruptcy Court and that they're going to
17 withdraw the reference.

18 And, Your Honor, the other special issue
19 that I mentioned is the sovereign immunity that I
20 think applies and requires a dismissal of the
21 complaint.

22 And, third, that, if the contract is null
23 and void, there's no injunction for specific
24 performance, there's no motion to turn over if there
25 is no contract to enforce.

1 And those three issues, Your Honor, before
2 we get into a full-day evidentiary hearing, hearing
3 witnesses as to the merits of a cause of action that
4 may not exist or may not be right for adjudication in
5 this Court, I think those three issues should be
6 resolved.

7 MR. GONZÁLEZ VÉLEZ: Your Honor?

8 THE COURT: Well, there is a contract until
9 it is declared null and void.

10 MR. MARINI: I understand.

11 THE COURT: Does that contract give
12 exclusive rights in certain regions to the Plaintiff?

13

14 MR. MARINI: Your Honor, I think the way
15 they have raised the argument is misplaced.

16 What the contract -- my understanding of the
17 contract, from reading it, is that what it provides
18 is a right to provide referrals, in the first
19 instance, to the Debtor in three regions, but there
20 are specific exclusions, Your Honor.

21 There are exclusions as to that obligation -
22 - Your Honor, I don't want to speak from memory. So,
23 if the Court will allow me a few seconds, I want to
24 get the contract.

25 (Documents are reviewed)

1 Now, there are specific inclusions --
2 inclusions to that obligation, assuming the contract
3 is in existence, to provide referrals that include
4 whether the equipment required to provide the
5 services is available, whether there is the personnel
6 necessary to conduct the tests, or where the volume
7 of patients is larger than the capacity of Medsci.

8 Your Honor, if the Court were to hear
9 evidence today -- and I don't think the Court should
10 get into the merits for the reasons that I have
11 articulated -- but, if the Court were to hear
12 evidence today, what might -- what I understand what
13 evidence is going to show is that my client has
14 complied with those obligations, Your Honor, has
15 complied with the clear language of the agreement.

16 Because, Your Honor, this is a contractual
17 dispute, and the terms are clear. Whatever the
18 Plaintiff can allege as to what was represented prior
19 to executing the contract, that is irrelevant.
20 Plaintiffs has -- their owners are two very well-
21 known and respected counselors. This was a contract
22 between sophisticated parties, and it is clear. And,
23 when you look at the terms of the contract, the
24 evidence will show that my client complied with the
25 referrals, that my client complied with the clause

1 requiring payment of invoices.

2 Because, contrary to what they allege, Your
3 Honor, in the complaint and in the motion, it doesn't
4 require invoices to be paid within 30 days.

5 THE COURT: Let me see if I understand your
6 argument. MR. MARINI: Yes.

7 THE COURT: First, you state that the
8 contract may be null and void. But, assuming it is
9 not, it is your position that the State Insurance
10 Fund has complied with the terms of the contract, has
11 not violated the referral clause, and has paid all
12 the invoices --

13 MR. MARINI: Correct that.

14 THE COURT: -- and is current?

15 MR. MARINI: And is current as per the terms
16 of the contract.

17 THE COURT: As per the terms of the
18 contract?

19 MR. MARINI: Correct, Your Honor.

20 That was my -- my -- that is -- and that is
21 what the evidence will show if the Court gets into
22 the merits, but I think it shouldn't for the other
23 reasons that I have articulated.

24 That -- and I -- to expand, Your Honor, to
25 be clear, I think what it would show is that they

1 have paid in accordance with the contract but the
2 contract does not require a specific timeperiod for
3 payment. It states only that you're going to pay
4 within a short amount of time or promptly -- I'll
5 look at the words -- in accordance with the
6 applicable laws, regulations of the State Insurance
7 Fund and of the Commonwealth of Puerto Rico.

8 And what the evidence will show is the
9 levels of review that are required before a payment
10 is made. Because, Your Honor, we're talking about
11 public funds. These are -- these are funds from the
12 Commonwealth of Puerto Rico, and that requires a
13 level of review. And my client has complied with
14 those applicable laws, applicable provisions, and
15 paid as required by the contract.

16 If the Court were to get into the merits,
17 what would find is that, if it were to adjudicate the
18 merits of the dispute today, the Court would be
19 adjudicating the merits of the contractual dispute.
20 Because, my client is going to present evidence that
21 it's going to -- apparently completely contradictory
22 to what they're saying -- they're going to present
23 evidence that they are complying with the contract --
24 and, if the Court were to get into the merits, it
25 would be, in essence, close to an adjudication of the

1 merits.

2 Because, that's what we're arguing, Your
3 Honor. The trial that we would have today or the
4 evidentiary hearing wouldn't be much different from
5 the trial we would have on the merits after
6 discovery, except that, at this stage, my client has
7 taken no discovery, my client has not renounced the
8 right to a jury trial, and there are jurisdictional
9 issues that haven't been raised -- addressed.

10 MR. GONZÁLEZ VÉLEZ: May -- may I? Just
11 very short.

12 THE COURT: Yes.

13 MR. GONZÁLEZ VÉLEZ: From what I -- I am not
14 capable, me, of playing in the league of these two
15 prior attorneys discussing the merits of the
16 bankruptcy law because of the fine points that they
17 have discussed.

18 So, I'm not -- I'm just going to answer, as
19 far as law is concerned, two very superficial matters
20 and then the compressable (sic) facts.

21 Number one, even if -- even if sovereign
22 immunity applied to the Fund, to the State Insurance
23 Fund, injunction is not limited by the sovereign
24 immunity. The sovereign immunity goes to determining
25 amounts of funds owed pursuant to local law by the

1 local government. And that is a very specific and
2 limited immunity. It is not for everything.

3 Courts, federal courts, issue injunctions in
4 regard to an order for cease and desist against state
5 officials, not to the corporations -- it's one of the
6 issues, whether they do qualify for the sovereign
7 immunity as a corporation -- it's another issue --
8 but, even assuming for the purposes of this specific
9 argument that they -- that it does apply, it does not
10 apply to an order to cease and desist.

11 And this is -- essentially, that's why I
12 expressed our request in the positive and the
13 negative manner. Because, what they are doing is
14 acting illegally against their own prior
15 representations and agreements, and that can be
16 stopped.

17 Now, if they want to refer to pay, if they
18 jurity (sic), and -- and they know -- and the
19 jurisprudence has already solved this type of issues.
20 It's called the inland reserve. If the Court should
21 decide -- which I'm sure it will not -- but, assuming
22 it would decide on, after, I presume, briefs, etc.,
23 that the eventual trial of the damages, which are
24 also claimed in the complaint, should go to the state
25 court, that does not mean that the Plaintiff here

1 would have to renounce to those rights that it has
2 that -- by federal court.

3 And, certainly, bankruptcy is federal law,
4 and it's -- I'm sorry -- and it's -- we would not be
5 renouncing to the injunctive power of this Court to
6 provide us the interim relief until the damages on
7 its day if they were found.

8 THE COURT: Okay. In that line, injunctive
9 relief is generally to preserve the status quo.
10 Okay? You don't want to preserve the status quo,
11 because the status quo is that, according to your
12 allegations, payments of invoices are not timely
13 made, and the State Insurance Fund is not complying
14 with the contract.

15 MR. GONZÁLEZ VÉLEZ: Well, in that --

16 THE COURT: So, I want specific --

17 MR. GONZÁLEZ VÉLEZ: Okay. Your Honor, as
18 Brother Counsel has previously mentioned, the status
19 quo we want to preserve is survival of this company.
20 And we want the compliance -- the status quo is a
21 compliance with the contract.

22 Normally, status quos that are to be
23 preserved but are not status quos against the law:
24 it's status quo inside the law. The law is at the
25 heart of equity, and it's the -- that's one of the --

1 THE COURT: Okay. What evidence do you have
2 -- I guess what you need now is, well, (1) money to
3 file operations, (2) compliance with the contract so
4 that you have the income to meet expenses.

5 MR. GONZÁLEZ VÉLEZ: That -- that -- that
6 summarizes it briefly.

7 THE COURT: But, ultimately, that would be
8 the trial. MR. GONZÁLEZ VÉLEZ: Yes.

9 THE COURT: But, at this time -- at this
10 time and this juncture -- assuming that you prevail,
11 since it's an interim remedy, it will be just for the
12 amount needed to preserve the estate, assuming that
13 you have the right to it, before a final decision.

14 So, --

15 MR. GONZÁLEZ VÉLEZ: But we -- we would
16 understand that --

17 THE COURT: -- so, what evidence would you
18 present to the Court as to what is needed by the
19 Debtor on an immediate and urgent basis and that the
20 State Insurance Fund has in order to keep the
21 corporation alive?

22 MR. GONZÁLEZ VÉLEZ: Well, we would need --
23 they --

24 THE COURT: What will you show?

25 MR. GONZÁLEZ VÉLEZ: Well, we will show that

1 the actual amount of patients, the actual amount of
2 patience is or should be close to the amounts we
3 claim. We would show
4 that --

5 THE COURT: What evidence do you have --

6 MR. GONZÁLEZ VÉLEZ: Yes, sir.

7 THE COURT: -- that the State Insurance Fund
8 has violated the terms of the contract?

9 MR. GONZÁLEZ VÉLEZ: The very fact that the
10 number of clients of patients differs substantially
11 from what is a known fact of a repeatable number of
12 patients in the regions at hand.

13 That fact by itself produces -- the amount
14 or the size of the discrepancy between the known
15 number of clients or patients and the referred number
16 of patients is such that it can only be taking place
17 if the patients are being referred to outside
18 suppliers.

19 In fact, we just, this morning, produced --
20 we could not produce the witness -- sadly, it's not -
21 - he's not available there, we cannot subpoena the
22 person -- but we -- this morning, we did obtain a
23 statement under penalty which we supplied by one of
24 the offices. It's been ordered to refer them as
25 suppliers.

1 THE COURT: Okay. What evidence do you have
2 that the State Insurance Fund has not paid invoices
3 that were validly submitted?

4 MR. GONZÁLEZ VÉLEZ: Well, we have -- No. 1
5 is the testimony of Doña Mónica who will -- this is
6 not my book, I'm sorry -- this is --

7 (Documents are reviewed)

8 MR. GONZÁLEZ VÉLEZ: We have the testimony,
9 Your Honor, of Doña Mónica Vizcarrondo. We have the
10 testimony of Don Eduardo González Glin which is the
11 Auditor which will provide the evidence of what is
12 actually being referred to in the billings. And
13 Counsel Velone will of course -- and we can also seat
14 Don Eduardo Carlo.

15 Don Roberto Reyes Pérez and Don Carlos Ruiz,
16 who were high executives -- one of them, of course,
17 was the administrator of the State Insurance Fund
18 when this contract was signed -- will explain to you
19 what our numbers and reasonable expectations of
20 numbers and why we say that the difference between
21 our expectations and what we receive will constitute
22 -- will result in only -- in only one reasonable
23 inference. It is inference, because we have not yet,
24 at this stage of the game -- we also need discovery
25 to find out who received those referrals that should

1 have gone to Medsci.

2 But the discrepancy is so great that it can
3 only take place if the patients are being referred
4 somewhere else. And that will be testified to by
5 these witnesses that are offered at this stage.

6 There was something else I wanted to bring
7 up -- please excuse -- also, Your Honor, I notice
8 that Brother Counsel has not said that he doesn't --
9 that the State Insurance Fund doesn't owe the amount.
10 He has very carefully stepped around the tulips but
11 has not stated clearly "We don't owe that amount" --
12 He hasn't said that -- the \$860,000 or so over --
13 over 60 days that are owed.

14 He has said that they have to pay it swiftly
15 -- or some other word, which is more or less an
16 adequate translation -- but he has not explained why
17 our demand that it be paid in 60 days is not a
18 reasonable swift payment or -- or if they --

19 THE COURT: According to the contract,
20 payment has to be made within what period of time?

21 MR. MUÑOZ: It's not stated.

22 MR. GONZÁLEZ VÉLEZ: Not stated, but as soon
23 as possible. And that was understood to be within 60
24 days.

25 I mean, again, this is the sort of thing

1 that it was in the same spirit as the paying of the
2 \$11 million or \$12 million. If they had taken 75
3 days, we would not be here. It is because there's
4 amounts of money owed over 150 days. And that, when
5 -- the law in Puerto Rico, as Your Honor knows, is
6 when no specific times, etc., like this situation,
7 are provided, it doesn't mean that it's in the hands
8 of one party or another to determine the
9 reasonability. And it is unreasonable to have to
10 wait five or six months for the payment of a service
11 provided.

12 And that was not the representation made, as
13 we will also prove. And we do have those witnesses
14 to show that.

15 Oh, one final thing, Your Honor: the
16 standard rules for injunction is that the probability
17 of who will prevail, besides who's suffering what
18 damage, are two essential criteria for issuing and
19 measuring the injunction -- the relief that will be
20 granted.

21 So, the argument of Brother Counsel that, if
22 you are listening to this evidence, you are going to
23 be prejudging the case, it is to a certain degree.
24 It's not complete, because we will have other
25 witnesses. We also will make discovery so as they

1 will.

2 But this, Your Honor, will have to -- if --
3 if it decides to go on, we'll have to listen to
4 evidence as to what was the contract and who is
5 apparently complying or not with the terms of the
6 contract and who's suffering what damage.

7 And, in that sense, it is a precursor or a
8 prelude to the trial on its merits, but that's
9 standard injunction practice.

10 THE COURT: I am not going to decide the
11 complaint today.

12 Assuming that you prevail, how much is
13 needed for what period of time, and where are the
14 funds going to come from?

15 MR. GONZÁLEZ VÉLEZ: At this stage, we
16 figure that we need about \$700,000 out of the 800 or
17 of those 900 that's outstanding.

18 THE COURT: Okay. That's a conclusion.

19 How do you reach that conclusion?

20 MR. GONZÁLEZ VÉLEZ: Well, we have an aging
21 system that determines -- you mean, for the amount
22 needed or -- or for how much we need? Or for how
23 much is outstanding? I'm sorry. I didn't
24 understand.

25 THE COURT: I said I am not going to decide

1 the merits of the complaint today.

2 MR. GONZÁLEZ VÉLEZ: Yeah, I understand.

3 THE COURT: I will only provide an interim
4 relief to prevent immediate and irreparable damage to
5 the estate.

6 MR. GONZÁLEZ VÉLEZ: Brother Counsel --
7 Counsel Velone, but, let's say, the principal, says -
8 - tells me that he -- it will be part of his
9 testimony as to what exactly he needs and why. And
10 we can provide that.

11 And the reasons why, essentially, the
12 obligation to pay the post-financial and the
13 maintenance of the equipment, Your Honor. Right now,
14 we are not able to pay adequately the maintenance of
15 the equipment. And that has been a source of
16 contention with SIF.

17 THE COURT: Okay. Do any -- what are the --

18 MR. GONZÁLEZ VÉLEZ: Yes?

19 THE COURT: -- laws governing accountability
20 of the government of Puerto Rico?

21 MR. MARINI: Your Honor, that would be part
22 of the evidence if it were to be presented. We -- we
23 believe --

24 THE COURT: And -- and the -- are there any

25 --

1 MR. MARINI: -- the regulations --

2 THE COURT: -- written applicable procedures

3 --

4 MR. MARINI: Yes.

5 THE COURT: -- as to how the invoices are
6 processed?

7 MR. MARINI: Absolutely, Your Honor.

8 THE COURT: Because, that's what the
9 contract --

10 MR. MARINI: Absolutely, Your Honor.

11 THE COURT: -- provides for. I just --

12 MR. MARINI: I -- I agree. And I was going
13 to read that part.

14 THE COURT: And your position is that you're
15 complying with the law regarding accountability and
16 applicable regulations?

17 MR. MARINI: Correct, Your Honor. That
18 would be the testimony.

19 THE COURT: And you have them?

20 MR. MARINI: That would be the testimony of
21 my witness.

22 THE COURT: Because, I don't know what they
23 are.

24 MR. MARINI: Yes. Your Honor, it requires -
25 - and I don't intend to be an expert on it -- but it

1 requires a multilevel review from different sectors
2 of the government before public funds are sent out.

3 And the argument that Brother Counsel made -
4 -

5 THE COURT: Okay.

6 MR. MARINI: -- that the contract requires
7 prompt is inaccurate. It's incomplete is the right
8 word. Because, it's not that it requires prompt
9 payment; it's that it requires prompt payment after
10 that process has been concluded.

11 As to the substantial majority -- I say
12 substantial, Your Honor, because -- and I'll explain
13 that in the second -- but, as to the substantial
14 majority of what they're claiming, that process has
15 not been completed.

16 And, if the Court were to issue an order
17 today requiring my client to pay money, it would be
18 providing them remedies that they aren't entitled --

19 THE COURT: I will not order the State
20 Insurance Fund to violate law or applicable
21 regulations.

22 MR. MARINI: Then, Your Honor, if that were
23 the case, to be perfectly candid, any -- any order
24 requiring my client to pay money --

25 THE COURT: However, if there are amounts

1 owed pursuant to a valid contract that have not been
2 paid, --

3 MR. MARINI: Yes. That -- that I can --

4 THE COURT: -- that's a different.

5 MR. MARINI: -- I can -- I can articulate
6 that, Your Honor.

7 There are only -- as I mentioned before, my
8 client's position and what the evidence will show is
9 that they have complied and are complying with the
10 agreement. They will show that they have been paying
11 and they are -- and they have continued analyzing the
12 invoices.

13 As of today, there are about \$100,000 that
14 have completed that review and which my client would
15 be available -- would be able to pay. That is --
16 that is the extent of the amounts that have been
17 requested that have been reviewed in accordance to
18 law and can be paid pursuant to law and the --

19 THE COURT: And, generally, how much -- how
20 long does it take to process an invoice, on the
21 average?

22 MR. MARINI: May I take a second, Your
23 Honor?

24 (Counsel confers)

25 MR. MARINI: If I may? My partner who knows

1 the process better is going to address that.

2 THE COURT: Yes?

3 MR. MUÑIZ: Well, Your Honor, attorney
4 Mauricio Muñiz for the State Insurance Fund.

5 As we get to the evidence this afternoon,
6 what we have here is a witness, Rose Mary de Alarcón,
7 who's from the accounting department and who will
8 actually take the Court through the process of the
9 internal regulations. It's a published regulation of
10 the State Department which enumerates the steps and
11 the levels in the life cycle of --

12 THE COURT: Do you have a citation for that
13 regulation, where it can be found? Or --

14 MR. MUÑIZ: I have a copy for the Court that
15 may -- it's in Spanish, but --

16 THE COURT: That's fine.

17 (Documents are reviewed)

18 MR. GONZÁLEZ VÉLEZ: Is there a copy for the
19 Plaintiff as well?

20 (Documents are reviewed)

21 THE COURT: And what's of the citation to
22 the -- to the law, not to the regulation? It can be
23 found where?

24 MR. MUÑIZ: To the law?

25 THE COURT: "Ley de contabilidad del

1 gobierno de Puerto Rico".

2 (Documents are reviewed)

3 MR. MUÑIZ: This is the internal policy
4 that's being followed by the SIF.

5 THE COURT: Okay.

6 MR. MUÑIZ: And, Your Honor, as -- as we
7 will show through the evidence, and as this document
8 shows, the process is that, say, the life cycle of
9 the invoice is, once the service is rendered, the
10 provider, in this case, Medsci, has to fill out
11 several paperwork and prepare appropriately an
12 invoice.

13 And, once it's submitted to the SIF, say,
14 for example, in this case, the service is provided to
15 -- in Mayagüez -- so, the three regions in question
16 are Mayagüez, Ponce, and Carolina -- the invoice for
17 that specific service needs to be submitted to the
18 specific region where the service was provided.

19 And then, the acting -- the medical director
20 of that -- of the different regions has to certify
21 invoice by invoice that the service was provided.

22 THE COURT: But what's an estimate of the --

23 MR. MUÑIZ: About three months. Three to
24 four months.

25 THE COURT: 90 days? From 90 to 120 days?

1 MR. MUÑIZ: Once it receives the invoice,
2 yes.

You can say 90, Your Honor. And that's once
the invoice is received. Because, as the evidence
will show, for example, invoices for services
rendered, for example, Medsci rendered some services
in January, it took them -- it took them about 45
days to actually submit the invoice to the State
Insurance Fund.

10 THE COURT: And what is the citation to the
11 accounting law of Puerto Rico?

12 MR. MUÑIZ: I don't have it here with me,
13 Your Honor, but I will find out.

14 You're saying the "Ley de contabilidad del
15 gabinete"? THE COURT: Yes. The accounting
16 law, yes.

17 MR. MUÑIZ: Okay. I will find that. I
18 don't have the exact citation.

19 THE COURT: Okay. Then, thank you.

20 Of the three threshold issues that we have
21 mentioned, one is the issue of the jury trial, that
22 has been withdrawn, so that's not an issue.

23 MR. MARINI: No, it's not -- it's not an
24 issue, Your Honor.

25 THE COURT: It's not an issue.

1 MR. MARINI: To the extent that I have --
2 that I have a right --

3 THE COURT: It may become an issue if you
4 claim it and then we establish that there is a right
5 to a jury trial.

6 On the issue of whether the contract is null
7 and void, as of this moment, there is a valid
8 contract, until it's declared null and void. We
9 cannot assume that it's small and void.

10 MR. MARINI: Your Honor, --

11 THE COURT: I am assuming -- what I am
12 assuming is that it was an arms-length transaction
13 between the parties and that the contract was drawn
14 and it has been ongoing for a couple of years, three
15 or four years -- two or three years, I guess.

16 The only pending issue would be whether or
17 not the State Insurance Fund is immune from this --
18 from this suit. And I'll -- I'll look closer to
19 that. I am under the impression that, under the
20 recent decisions of Katz and Hood, there may be
21 jurisdictional authority of this Court to entertain
22 this action, maybe not so before those positions.
23 But I'll look at that closer, and I'll announce that
24 after we convene this afternoon at 1:45.

25 MR. MARINI: Could I mention something, Your

1 Honor? I understand the Court is --

2 THE COURT: But be ready to present the
3 evidence at 1:45, assuming that I may find that the
4 State Insurance Fund is not, in this action,
5 protected under sovereign immunity.

6 MR. MARINI: Okay. Can I make just one
7 point? And I understand the Court's position.

8 The only point that I would make is that the
9 argument as to null and void is really a legal -- a
10 legal argument, to the extent that the owners are not
11 licensed physicians is a matter that I can submit to
12 the Court and the Court can make a legal
13 determination.

14 THE COURT: But, let -- let's assume they
15 are not licensed physicians -- which I think that
16 could be
17 stipulated --

18 MR. GONZÁLEZ VÉLEZ: Yes. Yes.

19 THE COURT: -- I don't think they are
20 licensed physicians -- does that make -- and they
21 are, because it's been declared in the petition they
22 are the principals of the corporation -- so, does
23 that mean that the contract is null and void?

24 MR. MARINI: Your Honor, I think that is the
25 case pursuant to the Supreme Court cases that I --

1 that I explained before to the --

2 THE COURT: But isn't it the case that
3 whoever provides the services, the reading of the X-
4 rays, has to be a licensed physician, not the owner?

5 MR. MARINI: I -- my understanding of the
6 cases is that the corporation that is engaged in the
7 contract to provide the services, that if that is the
8 case that you're going to have a corporation or an
9 entity signing a contract to provide services which
10 require a license -- in that case, it was engineering
11 -- that the owners need to have a license or the
12 contract is null and void.

13 It's not only in those cases, it's also in
14 the law of corporations. If you're going to be an
15 entity to engage in providing medical services, it
16 has to be a professional services corporation, and
17 its owners must be licensed physicians. Its article
18 1802, 1805, and 1808 of the law of corporations.

19 MR. GONZÁLEZ VÉLEZ: May I?

20 THE COURT: Yes.

21 MR. GONZÁLEZ VÉLEZ: It's just two things.
22 The first one which I want to ask: I understood that
23 Brother Counsel said that 90 days was more
24 representative of what the time should be for the --
25 for the paying of the -- if that is correct, I would

1 like to know, because there is an outstanding amount,
2 which would be less than what we have claimed that as
3 outstanding and property of the estate today, but
4 that could take care of part of our controversies.

5 Number two, Your Honor, there's an estoppel
6 here involved. State Insurance Fund at all times
7 knew who the owners of the corporation were, what
8 they were, what they were not, and they were invited
9 to this to provide this, the services and the
10 equipment, and, of course, they do not provide direct
11 services: the doctors do.

12 And -- but, there's an important thing that
13 comes of to my mind, and it's: do all owners of stock
14 in hospitals and corporations involved in any way in
15 providing medical or medical-related services have to
16 be doctors or authorized --

17 THE COURT: Are you asking me?

18 MR. GONZÁLEZ VÉLEZ: -- I -- I don't think
19 so.

20 THE COURT: Are you asking me? I don't
21 know. You show me --

22 MR. GONZÁLEZ VÉLEZ: Okay. Well, Yeah,
23 Yeah.

24 THE COURT: -- whether or not this is a
25 valid corporation.

1 MR. GONZÁLEZ VÉLEZ: I -- I've gone it.
2 I've got it. But I -- I do -- I -- I think he has to
3 prove that, that it's a requirement, because he has
4 negotiated and -- and --

5 THE COURT: Give me the citations and the
6 case law.

7 MR. MARINI: I will, Your Honor.

8 (Documents are reviewed)

9 MR. GONZÁLEZ VÉLEZ: Oh, finally, Your
10 Honor, yes, we are going to start showing evidence at
11 2:00 if -- if -- or 1:45 is the time that the Court
12 is actually --

13 THE COURT: It's going to be two hours after
14 we finish in the morning.

15 MR. MARINI: The citations: the law
16 requiring that that someone engaged in this type of
17 practice and have a license is 20 LPRA Section 135
18 (d).

19 The law of corporations requiring that
20 entities engaged in professional services be a
21 professional service corporation is article 18 of the
22 law of corporations. I'm missing the first citation.
23 But it's the law of corporations, article 18, part --
24 and specifically article 1802 defines what is a
25 professional service corporation and to what type of

1 services it applies, including medicine.

2 Article 1808 -- article 1808 states that any
3 owners of that entity must be a licensed -- in this
4 case -- physician.

5 The citation, Your Honor, -- my colleague
6 just gave it to me -- is [Law No. 164, December 16,
7 2009].

8 And the article I just mentioned as to the
9 owners is an article 1802.

10 THE COURT: Well, is that the 2009 law? But
11 this is a --

12 MR. MARINI: Maybe -- Your Honor, and if
13 it's --

14 THE COURT: -- a 2007 contract.

15 UNIDENTIFIED INDIVIDUAL: (Off mic) Your
16 Honor, if it was amended, whether or not the same
17 requirement was (Off mic) --

18 MR. MARINI: Alright. Let me give him the
19 recent one, but I think it existed before.

20 (Documents are reviewed)

21 MR. MARINI: No, Your Honor, let me -- the
22 case law that I -- the case law that I mentioned, the
23 two cases, one of them is -- let me make sure that I
24 have the correct citation -- the "Colegio de
25 Ingenieros y Agrimensores de Puerto Rico vs.

1 Autoridad de Acueductos y Alcantarrillados", 131 DPR
2 735. It is a 1992 decision of the Supreme Court.

3 The second case is Raza Engineering Corp.
4 vs. Horacio Daubón, citation 86 DPR 193. And it is a
5 decision of the Supreme Court of 1962.

6 MR. MUÑOZ: Excuse me? 86 DPR?

7 MR. MARINI: 86 DPR 193.

8 MR. MUÑOZ: Okay.

9 MR. GONZÁLEZ VÉLEZ: If that is -- and, if
10 he's not there on the cases, we would respectfully
11 request that the Court withhold adjudging this subject
12 until we have an opportunity to check this matter,
13 because it's new for us. I mean, we didn't expect
14 this --

15 THE COURT: Well, it's new for me -- it's
16 new for me too. I'm going to check it at noon.

17 MR. GONZÁLEZ VÉLEZ: Okay.

18 MR. MARINI: And, Your Honor, the only --
19 the only response that I would make is that estoppel
20 doesn't apply --

21 THE COURT: If I don't -- if I don't hear
22 this today, it will probably take me at least three
23 more weeks before we can reconvene.

24 MR. GONZÁLEZ VÉLEZ: But we will be --

25 THE COURT: So, I have to finish this today.

1 I mean, if you don't need a quick decision --

2 MR. GONZÁLEZ VÉLEZ: No, no, no, no. No,
3 no.

4 THE COURT: -- in favor or against, that's
5 fine.

6 MR. GONZÁLEZ VÉLEZ: No, I just meant that
7 not -- ajudge this matter in the morning.

8 THE COURT: Okay.

9 MR. GONZÁLEZ VÉLEZ: We will read it during
10 the noon time.

11 THE COURT: I cannot -- I cannot make a
12 decision, because I don't know, I haven't read the
13 section. So, I think it would be irresponsible on my
14 part to -- to just give you my impression. I may be
15 wrong or right, but I have to read them first.

16 MR. GONZÁLEZ VÉLEZ: I -- I understand. All
17 I meant is that we would like to answer in the
18 afternoon after ruling the case if that's okay.

19 THE COURT: So, at two o'clock. The court
20 recesses until two o'clock.

21 MR. MARINI: Thank you.

22 (Hearing in this matter is to continue into
23 afternoon session at 2:00 p.m.)

24 (11:58 a.m.)

25

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6 AFTERNOON SESSION

7 (3:29 p.m.)

8 COURTROOM CLERK: (Calling case)

9 THE COURT: Before hearing from the parties,
10 let me make the following disclosure.

11 The attorneys for the parties and the Court
12 have been meeting in chambers, and I advanced to the
13 parties that I would be issuing two Bench decisions.
14 One, I will find that section 106, which is a waiver
15 of sovereign immunity, will apply in this case, and I
16 will deny without prejudice the request to declare
17 the contract small and void.

18 The third issue was the issue of the jury
19 trial. Since the complaint will be amended or
20 Plaintiffs will indicate that they are no longer
21 requesting a jury trial at this juncture, there is
22 not an issue. But, whether or not there is a right
23 to jury trial or whether or not this Court has the
24 power to hear an adversary proceeding or if there is
25 a right to jury trial without the consent of all

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1 parties.

2 Those were the three issues. In addition,
3 subject, and because of those decisions, the parties
4 have engaged in an en rem negotiations of the interim
5 remedy. But those, I will -- I will have the parties
6 proffer to the Court.

7 First, as to the decisions on the pending
8 motions, upon the issue of sovereign immunity, I find
9 the same is, in this case, is waived under section
10 106 of the Bankruptcy Code, and I will explain why.

11 First, Section 541 (a) of the Bankruptcy
12 Code determines that the commencement of a case
13 creates an estate over all legal or equitable
14 interests of the Debtor.

15 Section 28 USC 1334 (e) grants jurisdiction
16 to bankruptcy courts over property of the estate.

17 Section 157 (a) of Title 28 provides that
18 the District Court refers cases to the Bankruptcy
19 Court -- excuse me -- arising in, under, or related
20 to bankruptcy petitions. In this district, there is
21 an order of referral of all cases.

22 Now, the contract that the Debtor has with
23 the State Insurance Fund and the accounts receivable
24 therefrom are Debtor's principal assets and source of
25 income.

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1 With that basis, then we go to the action
2 which is before the Court. And I'm specifying: I'm
3 using 541 for the purpose of establishing what is
4 property of the estate, and, later, the relevance of
5 this will become apparent in the application of the
6 waiver of sovereign immunity over actions -- over en
7 rem actions in reference. So, I'm using 541 only for
8 the purpose of establishing that this is an en rem
9 proceeding.

10 Actually, the section under which the Debtor
11 has filed a -- or, one of the sections is Section
12 542, which governs the turnover of property. And, an
13 action over the turnover of property under 11 USC 542
14 (a) is a core proceeding pursuant to 28 USC 157 (b)
15 (2) (e).

16 The Defendants have brought or presented to
17 the Court or alleged that a District Court case
18 decides that the State Insurance Fund is entitled to
19 sovereign immunity. I have read the case of Berrios
20 Trinidad vs. Ruiz Nazario. I found it in Westlaw,
21 and it's 2009 Westlaw 866 864 District of Puerto
22 Rico, Judge Pieras' decision of March 27, 2009,
23 concluding that the State Insurance Fund, as an arm
24 of the State, is entitled to sovereign immunity.

25 At this time, I will follow the decision of

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1 Judge Pieras in determining that the State Insurance
2 Fund is entitled to sovereign immunity

3 However, in Bankruptcy, there is a slight
4 difference. There is a specific section, which is
5 Section 106, entitled "Waiver of sovereign immunity".
6 There are two leading cases or recent cases -- well,
7 recent is 2004-2006 -- which have expanded and
8 interpreted Section 106 of the Bankruptcy Code.

9 The first case is Tennessee Student
10 Assistance Corp. vs. Hood (sic), 124 Supreme Court
11 1905, 541 U.S. 440, 2004, which rules that generally
12 when a Bankruptcy Court exercises its en rem
13 jurisdiction, it does not infringe State sovereignty.
14

15 The second case is Central Virginia
16 Community College vs. Katz, 126 Supreme Court 990,
17 546 U.S. 356, 2006. This case held that, by
18 ratifying the Bankruptcy clause, that is, article
19 one, Section 8, clause 4, in the United States
20 Constitution, the States acquiesced to subordinate
21 sovereign immunity in proceedings necessary to
22 effectuate en rem jurisdiction of Bankruptcy Courts.

23 Having found that this is an en rem
24 proceeding, because it's a proceeding to preserve the
25 main asset of the estate, I am finding that there is

1 a waiver of sovereign immunity.

2 I did read the site to Collier's which
3 attorney Martini indicated at paragraph 106.04,
4 specifically pages 106.20 and 21. And, indeed, the
5 Collier's treatise cites or states that Congress --
6 excuse me -- Congress excluded, however, Section 541
7 from the abrogation list, as a result of which
8 government Defendants, absent a waiver, are still
9 permitted to assert sovereign immunity in proceedings
10 brought by the estate to enforce a prepetition cause
11 of action.

12 Congress apparently did not want to allow
13 the happenstance of a Debtor's Bankruptcy to permit
14 the estate to obtain a recovery against a
15 governmental unit that would not have otherwise have
16 been available outside of Bankruptcy because of
17 sovereign immunity.

18 However, there's a second paragraph, which
19 states Section 106 (a) does include Section 542 and
20 of the provisions for which sovereign immunity is
21 abrogated. This inclusion prevents a government unit
22 from frustrating efforts to consolidate estate
23 property in the Bankruptcy Court by holding onto it
24 and asserting sovereign immunity as a shield against
25 suit.

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1 Section 542, however, also provides that an
2 entity that owes a debt that is a property of the
3 estate shall pay the debt to the Trustee or Debtor,
4 because there is an uncertain line between suits
5 under Section 541 on a prepetition cause of action
6 and a turnover suit under Section 542 for the payment
7 of a prepetition debt.

8 A governmental unit's ability to defend on
9 the grounds of sovereign immunity may depend on how
10 the Court characterizes the suit. And that's why I'm
11 explaining and emphasizing that I'm using 541 to
12 determine what is property of the estate, to then
13 determine that this is an *en rem* action, but,
14 essentially, it's a turnover request under Section
15 542.

16 So, at this time, I'm denying the
17 Defendant's request for dismissal on sovereign
18 immunity grounds.

19 The second issue that was left pending is
20 that the contract is null and void because the
21 principals of the corporation are not licensed
22 doctors and have the inability or incapacity to
23 contract for the services which the corporation is
24 rendering to the State Insurance Fund.

25 Based upon what I have seen as of this

1 moment, the documents in evidence that have been -- I
2 have read, which is basically the petition and the
3 contract between the Debtor and the State Insurance
4 Fund, shows that this is a private corporation.

5 Under 14 Laws of Puerto Rico Annotated,
6 Section 2601 (b), corporations may be organized under
7 this subtitle to conduct or promote any lawful
8 business or purpose except those prohibited by the
9 Constitution and laws of the Commonwealth.

10 I have not seen any -- any prohibition
11 presented as of this moment as to this statutory
12 provision.

13 Now, there are also, under 14 Laws of Puerto
14 Rico Annotated, Section 3402 (a) and (b),
15 professional corporations -- that's professional
16 service corporations and professional corporations,
17 which are different from private corporations. A
18 professional service corporation is any type of
19 professional service to the public which by law,
20 regulation, or jurisprudence could not be effected by
21 a corporation before the effective date of this Act
22 and for which the obtaining of the license or other
23 legal authorization for the rendering of such
24 services be required as a condition precedent.

25 But this is not a PSC.

1 Professional Corp.: A corporation which is
2 organized under this chapter with the sole and
3 exclusive purpose of rendering professional service
4 and the auxiliary or complementary service to such
5 professional service and which only has as
6 stockholders individuals who are duly licensed in the
7 Commonwealth to offer the same professional services
8 as a corporation.

9 This is not the case as of this moment of
10 the Debtor-Plaintiff corporation.

11 Now, I've read the -- and gone over the
12 decision of Colegios de Ingenieros y Agrimensores de
13 Puerto Rico vs. AAA de Puerto Rico, 131 DPR 735,
14 which bases its decision in Raza Engineering Corp.
15 vs. Dubón et al., 86 DPR 193.

16 The Court, Supreme Court of Puerto Rico
17 found that, in those cases, the corporations were
18 rendering services that should have been rendered by
19 duly certified professionals.

20 As of this moment, the contract, as I see
21 the contract, and the provider, that is, the Debtor-
22 Corp., binds itself to provide equipment, training,
23 and to provide the tele -- let me see what the term
24 is -- a tele-radiological network. But, in that
25 provision of wherein they provide the places to

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1 install the tele-radiological network, it states as
2 follows: The provided places to install a tele-
3 radiological network at all premises of the
4 corporation and establish a center for remote
5 readings with duly certified and licensed medical
6 faculty available for rendering the service that is
7 hereby hired.

8 So, the corporation, in name, should not be
9 rendering the services that as a doctor or duly
10 certified technicians should be rendering.

11 As of this moment, I don't have that
12 evidence. So, that's why I'm denying the motion
13 without prejudice. If Defendant can bring to the
14 Court evidence, let's say, that the principals may
15 have been -- as an example, alleged therapy -- are
16 reading X-rays, obviously that's -- that's beyond the
17 scope, and that would be -- render a different
18 result.

19 So, at this time, I'm denying without
20 prejudice the request to find the contract null and
21 void. And I am not entering into any estoppel or
22 going against your own acts, defenses, that were
23 hinted by Counsel for Plaintiff. I'm just finding
24 that, based upon the reading of the contract, the law
25 of Puerto Rico as to corporations, that there appears

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1 no indication that the contract is null and void.

2 Now, those are my -- my two basic decisions.

3 Because, the issue of the jury trial has been
4 withdrawn by Plaintiff. And, if Defendant is going
5 to invoke a jury trial, it has until the time that
6 the complaint is answered. And, if that becomes an
7 issue, then we'll decide it.

8 Now, as to what is the interim emergency
9 remedy that will be provided to the Debtor, then I'll
10 ask the parties to make the proffer of what is that
11 agreement.

12 MR. MARINI: Good afternoon, Your Honor.

13 This is Luis Marini for the State Insurance Fund.

14 May I ask a brief clarification about the
15 rulings?

16 THE COURT: Yes.

17 MR. MARINI: The Court, if I understood
18 correctly, found that sovereign immunity had been
19 waived as to the actions because it involved 542.

20 I did not follow within --

21 THE COURT: Well, I find that this is an en
22 rem action. And, because it's an en rem action,
23 Section 106 applies, and this Court has jurisdiction.

24

25 MR. MARINI: I -- I understand, Your Honor.

1 THE COURT: And this -- I know I gave a very
2 systematic decision. I didn't have time to write it,
3 but that is the essence of my decision. And I'm
4 using as a basis the Supreme Court decisions of Hood
5 and Katz.

6 MR. MARINI: But I understood the decision.
7 I'm not -- I'm not certainly not arguing with it in
8 this case.

9 I just wanted -- I -- I didn't -- didn't
10 understand if it applied to the motion that was
11 scheduled for a hearing today or it was a
12 determination that sovereign immunity is waived for
13 all the allegations in the complaint.

14 That was my only request for clarification,
15 whether it is limited to the allegations raised and
16 the causes -- and the -- and the relief requested in
17 the motion of the hearing today, or it's a
18 determination of the complaint.

19 THE COURT: My decision answers your motion
20 to dismiss at this juncture, to dismiss because the
21 contract is null and void.

22 And at this juncture, based upon what I have
23 seen, that this is an en rem action under 542, there
24 is sovereign -- I mean, the contract is not null and
25 void, and sovereign immunity does not apply.

1 MR. MARINI: Okay. Thank you, Your Honor.

2 I'll go ahead and make the proffer, if I
3 may. As the Court mentioned, prior to going on the
4 record Counsel for the parties met in chambers and I
5 think have reached the agreement that I'm going to
6 proffer now.

7 I proffer, Your Honor, in general terms that
8 my client will -- will make a more specific proffer
9 as to some of the aspects I'm going to mention, for
10 the agreement in principle involves the following: my
11 client, as was the decision articulated during
12 argument, states and will reason to the Court that
13 they have complied with the terms of the agreement
14 and are going to continue complying with the terms of
15 the agreement. And that representation my client
16 will make in a few seconds.

17 In addition, there are certain amounts that
18 have been reviewed and are uncontested or are pretty
19 close to being uncontested, part of them to be in
20 finalized review, that are going to be paid, and they
21 are as follows: today, there is a check for
22 \$97,693.71 that is going to be paid by my client to
23 the Debtor.

24 There is a second payment -- and this is a
25 gross amount because a deduction of 7% would have to

1 be made -- of \$99,017 that my client will pay on or
2 before next Friday, Friday of next week.

3 These payments are being made by my client
4 because they are -- have been reviewed in accordance
5 with the terms of the agreement and are available to
6 paying.

7 In addition, the parties have agreed to meet
8 next week and discuss potential -- any possibility of
9 settlement. And, in the event that any such
10 settlement is not possible, inform the Court of the
11 status of the discussions and request a hearing to be
12 scheduled, for which we've already received a number
13 of dates.

14 And, finally, Your Honor -- and I understand
15 this applies to both sides -- this agreement is
16 without prejudice to any of the arguments and claims
17 and defenses that either my client or the Debtor may
18 have.

19 MR. GONZÁLEZ VÉLEZ: Your Honor, González
20 for Debtor-Plaintiff.

21 That more or less is what was agreed.
22 Except, I understood that our meeting did not have to
23 go all the way to settling the whole case but could
24 be as to the reach of an interim agreement until the
25 case is heard if we don't agree to a settlement of

1 the case. That was my understanding of it.

2 And, the other thing that maybe I -- this is
3 necessary -- I do understand that somebody's going to
4 sit in the witness chair and make the proffer. And
5 then, that's it, Your Honor.

6 MR. MARINI: (Off mic)

7 THE COURT: Mr. Marini?

8 MR. MARINI: Your Honor, Ms. Mayra Domenech
9 who is general counsel for the State Insurance Fund -
10 -

11 THE COURT: Yes?

12 MR. MARINI: -- will make the proffer.

13 THE COURT: Sure.

14 MS. DOMENECH: Good evening, Judge. Yes.

15 Mayra Domenech on behalf of the State Insurance Fund.
16

17 We have already discussed with our Counsel,
18 our Brother Counsel, the terms of this agreement, and
19 we would comply with what has been previously stated
20 to this Honorable Court.

21 THE COURT: Okay. There are two clauses
22 which I think are critical to perhaps the controversy
23 between the parties. And I'm just going to read
24 them, because I -- I -- obviously, the proffer is
25 made, and we are working and assuming that the

1 proffers and the contract will be complied with.

2 But, since there are allegations in the
3 complaint that they have not been complied with, I
4 just want to highlight them. And one is -- I guess,
5 in the first part -- Capital (n) says that the
6 corporation shall refer all its patients first to the
7 provider, and, should it not have availability of
8 equipment or personnel for the required tests or
9 whenever the volume of patients is greater than the
10 capacity of the provider to render the services, the
11 corporation shall refer said patients to external
12 providers. That's --

13 MR. MARINI: Your Honor, can we use the
14 contract itself instead of the --

15 THE COURT: I'm -- that's -- that's fine.
16 I'm reading from the one in English.

17 MR. MARINI: For example, while I was
18 reviewing --

19 MR. GONZÁLEZ VÉLEZ: If Your Honor -- I -- I
20 want to -- we endorse that it be read in Spanish,
21 Your Honor. A 100% (Off mic) it's like an
22 inaccuracy the translation.

23 THE COURT: Well, I'm -- I'm just reading
24 from the document that's --

25 MR. GONZÁLEZ VÉLEZ: I know. We submit,

1 Your

2 Honor, --

3 THE COURT: But in Spanish it says La
4 Corporación referirá todos sus pacientes en primer
5 orden al Proveedor. Y de éste no tener disponible
6 sus equipos y personal para la pruebas requeridas, o
7 cuando el volumen de pacientes sea mayor que la
8 capacidad de el Proveedor para prestar los servicios,
9 la Corporación referirá dichos pacientes a
10 proveedores externos.

11 That's -- that's the Spanish.

12 The other clause refers to the payments.

13 MR. GONZÁLEZ VÉLEZ: It's (c), Your Honor.

14 The following (c) (sic) (Off mic).

15 THE COURT: I had it marked, and I lost it.

16 (Documents are reviewed)

17 THE COURT: Okay. (c). I'm going to read
18 it in English and in Spanish.

19 The corporation shall process said invoices
20 in accordance with the accounting law of the
21 government of Puerto Rico and to all applicable
22 procedures pursuant to currently enforceable public
23 and administrative policy in effect and shall proceed
24 to issue the corresponding payments within the least
25 amount of time possible.

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1 For this to be so, it is indispensable for
2 each invoice to contain the required information in
3 all its parts and be accompanied by the attachments
4 and/or necessary documents for processing payment.

5 Likewise, it is an indispensable condition
6 that the services to have been provided pursuant to
7 applicable laws, regulations, norms, and procedures
8 demanded by the corporation.

9 (Documents are reviewed)

10 MR. MARINI: It's in page 5 of the Spanish
11 version.

12 THE COURT: In Spanish, it's: (Citing
13 Spanish language version of previously read English
14 version)

15 I think those are key.

16 MS. DOMENECH: Yes, Your Honor. And the
17 State Insurance Fund does state that it will keep and
18 accompany with the terms of the contract as stated by
19 the Hon. Judge.

20 MR. GONZÁLEZ VÉLEZ: One question, Your
21 Honor?

22 THE COURT: Yes?

23 MR. GONZÁLEZ VÉLEZ: I would like to know
24 that Sister Counsel -- and please excuse the question
25 -- is duly authorized to represent the State

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1 Insurance Fund and her principal and officers that
2 are going to make this proffer. And I realize that
3 it's probably an absurd requirement, but I will like
4 to have it.

5 THE COURT: Well, as general counsel of the
6 State Insurance Fund, I am assuming that she
7 represents the State Insurance Fund.

8 MS. DOMENECH: I do, Your Honor.

9 MR. GONZÁLEZ VÉLEZ: Please excuse, Your
10 Honor. I just wanted to ...

11 THE COURT: Okay. And, as to settlement,
12 which you've mentioned, I understand that, at this
13 stage, individually you're discussing interim
14 settlement, but that does not mean that you cannot
15 discuss ultimate settlement after you have opened
16 your records and discovery, perhaps to be in a better
17 position to inform the Court.

18 MR. GONZÁLEZ VÉLEZ: (Off mic) as they say,
19 a Spanish saying. And my client -- and, certainly, I
20 I endorse it. And Judge Toruellas says that we
21 should settle everything, and he should know.

22 So, -- so, I -- yes, Your Honor.

23 THE COURT: And -- and, if, as discussed in
24 chambers, the parties are going to meet next week and
25 try to exchange as much information as possible and

1 to put each other in a position to determine what is
2 the reasonable interim agreement that the parties
3 should enter into, and perhaps with a view towards a
4 more formal ultimate agreement.

5 MR. GONZÁLEZ VÉLEZ: Yes, Your Honor.

6 THE COURT: But, if that's not -- if that is
7 not accomplished, since I understand that certainty
8 as to checks are only for this week and the next
9 week, then you move the Court -- and I have already
10 expressed to Counsel that we have cleared July 1, 2,
11 or 7 -- that's not all three days, that means 1 or 2
12 or 7. Because, I also have a list of other emergency
13 cases which are waiting.

14 MR. GONZÁLEZ VÉLEZ: Your Honor, it's very
15 generous.

16 THE COURT: So, ...

17 MR. MARINI: Your Honor, I -- I would just
18 mention that, as I mentioned in chambers, I want to
19 check my calendar.

THE COURT: And -- and,
20 just to make it clear and to make it more expedited,
21 I am going to request any witness that the party
22 would present that direct would be through a sworn
23 statement, then the witness will sit and we cross
24 examine him. That way, it will be faster.

25 And, if a witness is going to refer to

1 documents, then they should be attached also.

2 MR. GONZÁLEZ VÉLEZ: How many days -- well,
3 we'll deal with that later, Your Honor. We'll deal
4 with that later. Would a statement under
5 penalty suffice?

6 THE COURT: A statement under penalty of
7 perjury.

8 MR. GONZÁLEZ VÉLEZ: Thank you.

9 MR. MARINI: May I just confirm my --

10 MR. GONZÁLEZ VÉLEZ: Thank you, Your Honor.

11 THE COURT: Any other matter in this case?

12 MR. MARINI: There are none from my side. I
13 would just clarified, as I mentioned --

14 THE COURT: But let me -- I -- I -- perhaps
15 I -- I don't know if I answered your question as to
16 whether this is a ruling for the case or a ruling for
17 this motion. Maybe I -- what is your specific
18 question?

19 MR. GONZÁLEZ VÉLEZ: You did, I think.

20 MR. MARINI: I thought you answered it, Your
21 Honor.

22 THE COURT: Okay.

23 MR. GONZÁLEZ VÉLEZ: Yes, you did, Your
24 Honor.

25 MR. MARINI: For me, Your Honor, I just

1 wanted to clarify, as I mentioned in chambers, that I
2 am not available on the first. I don't have my
3 calendar. And my client's not available on the
4 second. But we are available on the seventh. And I
5 -- we'll coordinate that with Brother Counsel and the
6 courtroom deputy if it becomes necessary.

7 THE COURT: Thank you very much. You're
8 excused.

9 MR. MARINI: Thank you, Your Honor.

10 MR. GONZÁLEZ VÉLEZ: Thank you very much.

11 THE COURT: Court's adjourned.

12 (Hearing in this matter is hereupon concluded for
13 this day)

14 (4:00 p.m.)

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1 TRANSCRIBER CERTIFICATION

2
3 I, CRYSTAL INCHAUSTEGUI BREAZ, Transcriber,
4 do hereby certify that the foregoing transcript was
5 transcribed by me to the best of my abilities.

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7 I CERTIFY that all "(inaudible)" were
8 carefully reviewed and found to be as written.

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10 I FURTHER CERTIFY that I am not interested in
11 the outcome of the case mentioned in said caption.

12
13 WITNESS MY HAND this 13 day of the month of
14 July, 2010 in San Juan, Puerto Rico.

15
16 _____
17 S/ CRYSTAL INCHAUSTEGUI
18 CRYSTAL INCHAUSTEGUI BREAZ

19 I, DIANE BREAZ, RPR and Official Court Reporter for
20 the District Court of Puerto Rico, certify that the
21 foregoing transcript has been verified and certified
22 by me.

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